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NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF TEXAS,
Petitioner
vs.
JOYCE ANN VAN GUILDER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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QUESTIONS PRESENTED

I.

Does the Due Process Clause of the Fourteenth Amendment require a state appellate court to review the sufficiency of the evidence supporting an affirmative defense in addition to reviewing the sufficiency of the evidence to support the statutory elements of the offense?

II

Does there exist a constitutional imperative, under the Fourteenth Amendment's Due Process Clause, that a State must disprove beyond a reasonable doubt every fact constituting an affirmative defense relating to the culpability of a criminal accused?

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In the

SUPREME COURT OF THE UNITED STATES

THE STATE OF TEXAS,
Petitioner

v.

JOYCE ANN VAN GUILDER
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner, the State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas entered in this proceeding on November 6, 1985.

OPINIONS AND ORDERS OF THE COURTS BELOW

The opinion of the Court of Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, dated July 25, 1984 reversing the conviction is reported as *Van Guilder v. State*, 674 S.W.2d 915 (Tex. App. — San Antonio 1984, pet. granted). The opinion is reproduced in the Appendix. (A-1)

The opinion of the Texas Court of Criminal Appeals in this cause affirming the action of the Court of Appeals under its Cause Number 899-84, on State's Petition for Discretionary Review, dated November 6, 1985, is printed in the Appendix. (A-) It is not yet reported.

The order of the Texas Court of Criminal Appeals denying the State's Motion for Rehearing, dated January 29, 1986 is printed in the Appendix. (A-28) It is not reported.

The order of the Texas Court of Criminal Appeals granting a stay of the execution of the mandate, dated February 11, 1986 is printed in the Appendix. (A-29) It is not reported.

JURISDICTION

The Court of Criminal Appeals of Texas rendered its decision on November 6, 1985. A timely filed State's motion for rehearing was denied on January 29, 1986. This petition for writ of certiorari is filed within sixty days after final judgment. The same issues indicated in the Questions Presented have been addressed at every level and stage of these proceedings. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the United States Constitution:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Penal Code Ann. § 19.02 (1974):

(a) A person commits and offense if he:
(1)intentionally or knowingly causes the death of an individual.

Tex. Penal Code Ann. § 15.01 (1974):

(a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

Tex. Penal Code Ann. § 6.03 (1974):

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Tex. Penal Code Ann. § 2.01 (1974):

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

Tex. Penal Code Ann. § 2.04 (1974):

(a) An affirmative defense in this code is so labeled by the phrase: "It is an affirmative defense to prosecution. . . ."
(b) The prosecuting attorney is not required to negate the existence of an affirmative defense in the accusation charging commission of the offense.
(c) The issue of the existence of an affirmative defense is not submitted to the jury unless evidence is admitted supporting the defense.
(d) If the issue of the existence of an affirmative defense is submitted to the jury, the court shall charge that the defendant must prove the affirmative defense by a preponderance of evidence.

Tex. Penal Code Ann. § 8.01 (1974)(amended 1983):

(a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of mental disease or defect, either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent, Joyce Ann Van Gilder, was indicted for five offenses arising out of a single continuous criminal episode. One indictment was for the offense of murder, the remaining four indictments, including the one which forms the basis of the petition, were for the offense of attempted murder. A joint jury trial was conducted on all five of the indictments. Respondent entered a plea of not guilty to each of the five indictments and presented a defense based on the law of insanity. The trial court submitted a charge to the jury explaining the law on the issue of insanity, and applying the law of insanity to the facts of the case. The jury found respondent guilty on one of the indictments alleging attempted murder. The jury returned verdicts of not guilty by reason of insanity on the remaining four indictments.

Respondent filed a motion for new trial alleging that the verdict of guilty was "contrary to the law and the evidence". The trial court denied respondent's motion for new trial.

The Court of Appeals for the Fourth Supreme Judicial District, San Antonio, Texas reversed the judgment of the trial court on July 25, 1985. The Fourth Court of Appeals reasoned that respondent's affirmative defense of insanity had been established as a matter of law and that the jury finding on insanity was against the "great weight and preponderance of the evidence." No motion for rehearing was filed in the Court of Appeals for the Fourth Supreme Judicial District.

On April 3, 1985, the Court of Criminal Appeals of Texas granted the State's Petition for Discretionary Review. The cause was submitted on July 17, 1985, with both sides presenting oral argument before the Court of Criminal Appeals of Texas en banc. On November 6, 1985, the Court of Criminal Appeals, in an opinion by Judge W.C. Davis, affirmed the judgment of the Court of Appeals for the Fourth Supreme Judicial District. On January 29, 1986 the state's motion for rehearing was denied.

B. Statement of Facts

The pertinent facts, as brought forth during the respondent's trial, are contained in the opinions of the Court of Criminal Appeals of Texas and Court of Appeals for the Fourth Supreme Judicial District, San Antonio, Texas. (A-1)

REASONS FOR GRANTING THE WRIT

I.

The holding of the Court of Criminal Appeals of Texas erroneously applies the holdings of *Jackson v. Virginia*, 443 U.S. 307 (1979) and *In re Winship*, 397 U.S. 358 (1978) to the review of an affirmative defense to the review of an affirmative defense in a criminal action.

In the seminal case of *In re Winship*, 397 U.S. 358 (1970) this Court addressed the question of whether the Fourteenth Amendment's Due Process Clause requires the prosecution to prove the guilt of a criminal accused "beyond a reasonable doubt". This question was answered with an emphatic "yes" when the Court, in the words of Justice Brennan, held as follows:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship, id.* at 364

This due process guarantee was further defined by this Court in *Jackson v. Virginia,* 443 U.S. 307 (1979) as "evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense". *Jackson v. Virginia, id.* at 316. The Court in *Jackson* also established a test for ascertaining, at the appellate level, whether a conviciton is founded on sufficient evidence or is in violation of the mandate established in *Winship.* The test established in *Jackson* is as follows:

> "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (citation omitted). This familiar standard gives full play to the responsibility of the trier of the fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendent has been found guilty of the crime charged, the factfinder's role as a weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in a light most favorable to the prosecution. *Jackson v. Virginia, id.* at 319.

This standard of review has been expressly adopted in the state of Texas by the Court of Criminal Appeals. *Hudson v. State*, 675 S.W.2d 507 (Tex. Crim. App. 1983). *Wilson v. State*, S.W.2d 465 (Tex. Crim. App. 1983).

Despite the clear and explicit mandate set forth in *Jackson* regarding the role of the factfinder in resolving evidentiary conflicts, such as the one in the instant case, the Court of Criminal Appeals has thrust itself squarely into the role of a factfinder. In the words of the Court of Criminal Appeals the due process clause requires the following standard of review in cases involving affirmative defenses:

> "In order to preserve the minimum due process protection established in *Jackson*, supra and *Winship*, supra, the court of appeals must be allowed to review the sufficiency of the evidence to support the defendant's affirmative defense as well as the sufficiency of the evidence to support the conviction. Otherwise, a defendant's constitutional right to a review of the sufficiency of the evidence to support his conviction is violated."
>
> *Van Guilder v. State*, ___ S.W.2d ___, at slip opinion, pg. 5 (No. 899-84, Tex. Crim. App., November 6, 1985)

Under the guise of following the due process protections of the Fourteenth Amendment contained within *Winship*, the Court of Criminal Appeals has erroneously applied the standard of review dictated by *Jackson*. Moreover, the holding of the Court of Criminal Appeals has failed to abide by the legal conclusion dictated by the test set forth in *Jackson* that all the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, supra, at 319. On the contrary, the Court of Criminal Appeals has weighed the evidence offered on the issue of the affirmative defense of insanity and has made a subjective determination of innocence; this manner of review is expressly precluded by *Jackson*. *Jackson v. Virginia*, supra, at 319, note 13.

This Court should grant certiorari in order to reject the Court of Criminal Appeals' erroneous application of the holdings in *Jackson* and *Winship* to the facts of the instant case.

II.

The holding of the Court of Criminal Appeals of Texas is in direct and irreconcilable conflict with *Patterson v. New York*, 432 U.S. 197 (1977), and *Leland v. Oregon*, 343 U.S. 790 (1952).

In reversing the trial court's judgment of conviction the Court of Criminal Appeals held "that no rational trier of fact could have found that (respondent) failed to prove her affirmative defense by a preponderance of the evidence". *Van Guilder v. State, supra*, at slip opinion, pg. 11. This holding was based on the Court of Crminial Appeals' observation that the prosecution produced no rebuttal evidence on the issue of the appellant's sanity. *Van Guilder v. State, supra*, at slip opinion, pg. 11. According to the Court of Criminal Appeals, the prosecution's failure to produce rebuttal evidence on the issue of sanity resulted in a violation of the respondent's due process right not to be convicted of a crime in the absence of proof beyond a reasonable doubt as required by *Winship* and *Jackson*.

Petitioner would respectfully submit that the holding of the Court of Criminal Appeals is based on an erroneous interpretation of *Winship* and *Jackson.* (See: Reason for Review One) The ultimate result of this erroneous interpretation of the due process clause is a holding, by the Court of Criminal Appeals, which is in direct and irreconcilable conflict with the holdings of this Court in *Patterson v. New York,* 432 U.S. 197 (1977) and *Leland v. Oregon,* 343 U.S. 790 (1952).

In *Patterson* the Court was presented with the question of the constitutionality of burdening a criminal accused with proving an affirmative defense. At the outset, the Court noted that it is within the power of the State to regulate the burden of producing evidence and the burden of persuasion. *Patterson v. New York, supra,* at 201. The Court in *Patterson* noted that under the *Winship* doctrine the prosecution shoulders the burden of proving "every fact necessary to constitute the crime" with which the accused is charged. *Patterson v. New York, supra,* at 204. The Court went on to hold, that under the rationale of *Leland* it is not a violation of the due process clause to burden the defendant with proving an affirmative defense. *Patterson v. New York, supra,* at 205.

The *Patterson* opinion declined to reconsider the holding of *Leland,* and went on to state the following, regarding due process of law in the context of affirmative defenses:

> "We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic pro-

> **cedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch.** *We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the non-existence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. Patterson v. New York, supra,* **at 210 (emphasis added).**

The legislature of the State of Texas has chosen to place the burden of proof of affirmative defenses on the accused. *Tex. Penal Code Ann.* **§ 2.04 (Vernon 1974). Furthermore, the Texas legislature has seen fit to define the defense of insanity as an affirmative defense.** *Tex. Penal Code Ann.* **§ 8.01 (Vernon 1974) (amended 1983). The holding of the Court of Criminal Appeals clearly does what the legislature has chosen not to do; it requires the prosecution to prove the sanity of a criminal accused.** *Van Guilder v. State, supra,* **at slip opinion, pg. 8.**

In the guise of following the dictates of the due process clause and the holdings of *Jackson* **and** *Winship,* **the Court of Criminal Appeals has violated the clear and explicit holdings of** *Patterson* **and** *Leland.* **In so doing, the Court of Criminal Appeals has unilaterally grafted upon the definitions of all penal offenses in the state of Texas an additional element, the disproving of any affirmative defense.**

This Court should grant certiorari in order to ascertain whether *Patterson* **and** *Leland* **require the prosecution to produce proof of a criminal accused's sanity.**

CONCLUSION

For these reasons, Petitioner prays that a writ for certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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APPENDIX

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Opinion of the Court of Criminal Appeals
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(dated November 6, 1985) A-23

Order by The Court of Criminal Appeals of Texas
overruling State's Motion For Rehearing
(dated January 29, 1986) A-28

Order by The Court of Criminal Appeals of Texas
Staying Issuance of Mandate
(dated February 11, 1986) A-29

NO. 04-83-00109-CR
IN THE COURT OF APPEALS
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
SAN ANTONIO
JULY 25, 1984

JOYCE ANN VAN GUILDER, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

Appeal from Bexar County

Before Preston H. Dial, Associate Justice, Rudy Esquivel, Associate Justice, and Blair Reeves, Associate Justice

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This is an appeal from a conviction for attempted murder. The appellant was found guilty in a jury trial for this offense and was assessed punishment by the jury at twenty (20) years' confinement in the Texas Department of Corrections.

The appellant was indicted for five offenses growing out of one continuous transaction. One indictment was for the offense of murder, and the other four indictments, including the one on which this appeal is based, were for the offense of attempted murder. By agreement, a joint trial was held on all five indictments. The appellant entered a plea of not guilty by reason of insanity to each of the five indictments. Inexplicably, the jury found the appellant guilty of the offense that occurred first in time, and not guilty by reason of insanity on the other four indictments.

There is virtually no dispute as to the evidence of the commission of the five offenses. On the date in question at approximately 11:00 a.m., Sterling Ditzler was sitting on a sofa in the living room of his duplex-type apartment watching television. The appellant, a tenant in the same apartment complex, abruptly entered the apartment and yelled, "You're going to pay, you killed her," and shot Ditzler with a pistol, wounding him. The appellant then shot two women in an adjoining kitchen; one was seriously wounded, and the other died. Ditzler ran out and entered an adjacent apartment. Appellant then appeared in the second apartment and repeated, "You killed her, and you're going to pay for it," and she shot and wounded two occupants in that apartment. Appellant then threw the pistol under a tree as she fled the premises. Appellant was taken into custody some three-quarters of a mile away from the scene. She had jumped or fallen off a high embankment to the apron of the interstate highway. As a result of the fall, appellant had sustained a fracture to both legs and her vertebra.

GROUND OF ERROR NO. 1:

THE VERDICT OF THE JURY IS CONTRARY TO THE GREAT WEIGHT AND PREPONDERANCE OF EVIDENCE AS TO BE MANIFESTLY WRONG AND UNJUST.

GROUND OF ERROR NO. 2:

THE VERDICT OF THE JURY IS CONTRARY TO THE EVIDENCE AS A MATTER OF LAW BECAUSE THE APPELLANT ESTABLISHED THE AFFIRMATIVE DEFENSE OF INSANITY.

Appellant's only evidence was offered on the issue of insanity. The evidence was lengthy, convincing and uncontroverted.

The evidence consisted of testimony by friends, the appellant's brother, and medical personnel. Appellant's medical history established that her father was an alcoholic who abused her mother. Appellant was sexually molested at an early age, and an incestuous relationship was attempted by a relative. Appellant had difficulty with her sexual identity, preferring to wear male clothes and adopting masculine mannerisms. While in the military, she developed a lesbian relationship which conflicted with her religious beliefs.

Dr. William Gillian testified that he was a psychiatrist and a member of the medical board that recommended the appellant's discharge from the Army. She was discharged on the basis of being medically unfit because of a psychiatric condition diagnosed as schizophrenic chronic with differential type. She was found to be thirty percent (30%) medically disabled.

At the time of her arrest, appellant was in a state of confusion. She did not know who she was, but she made attempts to conceal the fact that she was a female. She indicated, "Someone told me they were after me; someone told me I had to save the children." She thought she was in a jogging race such as the "Chariots of Fire." She was walking along the road when she perceived a big green car with a fat lip chasing her. The doctors excluded the possibility of malingering.

Dr. Paul Mohl testified that he was a psychiatrist on the staff of the Medical Center Hospital, where appellant was brought for treatment following her arrest. He stated appellant's thinking was not logical, and she expressed unrealistic ideas, such as being a biblical character named Jacob. She also expressed ideas of persecution for homosexuality. Dr. Mohl felt that appellant was psychotic of the schizophrenia type.

Dr, James O. Sherman, a psychologist employed by Bexar County, Texas, testified that he administered a battery of psychological tests to the appellant. Based on these tests and other information assembled by Dr. Sherman, he reached a diagnosis of schizphrenic disorder of the paranoid type. He was further of the opinion that on the date in question appellant was not able to fully appreciate the wrongfulness of her acts nor was she able to conform her behavior to the standards of law because of the delusions she was suffering.

Dr. John Sparks, the Bexar County psychiatrist, testified that he performed extensive psychiatric examinations on appellant upon orders of the court. He stated that appellant had a mental disease which he classified as schizophrenia of the paranoid type. It was Dr. Sparks' professional opinion that on the date in question, the appellant, as the result of a mental disease or defect, did not know that what she was doing was wrong, and she was incapable of conforming her conduct to the laws of society at that time.

Dr. Franklin Redmann, a private physician practicing in the specialty of psychiatry, was then asked a hypothetical question based on all the facts adduced at the trial. The doctor concluded that the person described in the facts would be unable

to tell right from wrong and would be unable to conform to what was right, as a result of mental disease or defect.

The State offered no rebuttal testimony on the issue of insanity. The State argues instead, that this particular defensive issue is an affirmative defense which the State is not required to negate. The State cites *Madrid v. State*, 595 S.W.2d 106 (Tex. Crim. App.), *cert. denied*, 449 U.S. 848 (1980); *Graham v. State*, 566 S.W.2d 941 (Tex. Crim. App. 1978).

The rule that the State is not required to negate affirmative defenses, though mentioned in *Madrid*, derives instead from TEX. PENAL CODE ANN. § 2.04(b) (Vernon 1974). The rule actually states in its entirety, "The prosecuting attorney is not required to negate the existence of an affirmative defense *in the accusation* charging commission of the offense." (Emphasis added). The statute means that the state does not have to plead in its indictment the negative of an affirmative defense. It does not give the State a free ride proof-wise if the affirmative defense is raised by credible evidence.

In *Madrid*, the appellant contended he had established his defense of insanity as a matter of law because the State produced no evidence in rebuttal. *Madrid* can be distinguished. As Judge Onion pointed out in his opinion on rehearing, appellant had one witness on the issue of insanity. He was a psychiatrist who testified he had only examined the appellant for one-and-a-half hours, and did not have the benefit of psychological testing. The State then called in rebuttal, another doctor who had practiced medicine and psychiatry for fifty years. This doctor testified he could not diagnose legal insanity based on only a one-and-a-half hour examination without psychological testing. The jury ap-

parently concluded that appellant had not established insanity by a preponderance of the evidence, i.e., the greater weight of *credible testimony.*

By contrast, in the present case, the defense offered five doctors with unimpeachable credibility. No effort was made to lessen the impact of the doctor's testimony through cross-examination. The attorney for the State, in a very commendable effort to comply with the requirement that exculpatory evidence be revealed, made a statement for the record out of the presence of the jury. He advised that the State had retained another doctor as a consultant. This doctor reviewed the material that had been available to Dr. Sparks and Dr. Sherman, and concurred in their diagnosis that at the time of the offense, the appellant was suffering from a paranoid schizophrenic condition that was the cause of her not being able to conform her conduct to the requirements of the law. The sheer weight and believeability of the appellant's evidence and testimony of insanity distinguishes our present case from *Madrid.*

The court in *Graham,* explored situations where a jury verdict of sanity should be upheld in spite of medical testimony to the contrary. The medical testimony in that case was not without equivocation, and the opportunity of the appellant's doctors to observe him was remote from the date of the offense. In our case at bar, Dr. Mohl testified that the psychiatric staff of the Medical Center Hospital was involved with the appellant from the moment she was brought to the emergency room. In *Graham,* the jury was able to consider the actions of the defendent before and after the offense as bearing on his mental condition. In our case, the landlady of the apartments where the appellant lived noticed something wrong with the apellant the day before the offenses occurred. The appellant had met a new friend named

Jane, and had gotten the idea at first, that Jane was her long lost half sister, and later decided she was her twin sister.The appellant told the landlady that she remembered killing a man because he was taking her sister away. On the morning before the offenses occurred, the appellant knocked on the landlady's door about 7:00 o'clock in the morning. Her voice was louder than usual. When she realized that the landlady had company, the appellant said, "That's all right," and went away crying.

The first individual to see the appellant after the offenses was a paramedic with the San Antonio Fire Department. He testified they had placed the appellant on a stretcher and when they started to raise the stretcher, she took her wallet out of her back pocket and threw it on the ground. The witness asked her why she had done it, and she denied throwing out the wallet though it was done in the witness's presence. The wallet was retrieved and returned to the appellant, and she threw it away again. The paramedics experienced difficulty in persuading the appellant to go to the hospital though she was in obvious need of emergency treatment. She said she did not need help and that the paramedics needed to go down to the apartments and help the children. A police officer, who had known the appellant on previous occasions, came to the ambulance. The appellant stated that she did not know who she was. When asked what had happened, the appellant said, "Someone told me that...someone told me that they were after me...someone told me I had to save the children. I had to go down there and get them. They were hurting the children. I had to stop it."

Attempts to conceal incriminating evidence or avoid detection or arrest can indicate knowledge of wrongful conduct and therefore evidence of present sanity. *Graham, supra,* at 951.

Here the appellant left her pistol under a tree at the scene of the offenses. When asked about the weapon while she was in the ambulance, the appellant was able to describe it, and told the officer exactly where the gun could be found. She told the officers her name was "Kevin." This was not an attempt to avoid arrest but some vague effort at concealing her gender.

Graham stands for the proposition that it is not necessary for the State to present expert medical testimony that a defendant is sane in order to counter the defense experts. The jury may accept lay testimony over that of experts. The facts testified to by the lay witnesses in *Graham*, furnished an adequate basis for the jury's conclusion that the defendant was sane. The facts developed by the lay testimony and the medical testimony in our case differ measurably from those in *Graham*, and compel a different conclusion. The State conceded on oral submission that the record contained no lay testimony supporting a finding of sanity.

Jurors may reject the opinion of experts if it does not comport with their ideas of sound logic. *Maryland Casualty Co. v. Hearks*, 144 Tex. 317, 190 S.W.2d 62, 64 (1945). Jurors are not required to give conclusive effect to the opinion of experts, but they may not arbitrarily disregard such testimony. Here there is no testimony, either medical or lay, upon which reaonable jurors could conclude that the appellant was sane at the time of the offense.

We recognize the rule in most other jurisdictions that inconsistent verdicts do not require reversal. *See Ruiz v. State*, 641 S.W.2d 364, 366 (Tex. App.--Corpus Christi 1982, no pet.) and cases cited therein. We do not rely on the inconsistency of

the verdicts as a reason for reversal of this particular verdict. We simply note that the evidence in the record that we feel overwhelmingly preponderates for insanity was the same evidence that so persuaded the jury on four other verdicts.

The State contends that this court does not have jurisdiction over the fact issue of great weight and preponderance of the evidence, *citing White v. State*, 591 S.W.2d 851, 855 (Tex. Crim. App. 1979). Judge Onion explained in *White* that the court of criminal appeals did not have jurisdiction to consider complaints that the verdict is against the weight and preponderance of the evidence "as would a court of civil appeals" under TEX. CONST. art. V, § 6. Section 6 has been amended since *White* to give courts of appeals the same fact jurisdiction in criminal cases. *White* is now authority that this court does have jurisdiction over such a fact question, and we here hold that we do. *Minor v. State*, 653 S.W.2d 349, 351 (Tex. App.–San Antonio 1983), *pet. ref'd*, 657 S.W.2d 811; *Schuessler v. State*, 647 S.W.2d 742, 748 (Tex. App.--El Paso 1983, Pet. granted); TEX. CODE CRIM. PROC. ANN. art. 44.25 (Vernon Supp. 1984). The only question that appears to have been left open is the conclusiveness of the decisions of the courts of appeals on questions of fact. *Minor v. State*, 657 S.W.2d at 812.

Acknowledging that we have jurisdiction of weight and preponderance fact issues, we do not reach that particular question. The general verdict of the jury finding appellant guilty of attempted murder, necessarily included a finding that appellant was legally sane at the time of the offense. We believe there is no evidence to support this finding, and we hold that appellant did, in fact, establish insanity as a matter of law. We sustain the appellant's ground of error number two that the verdict of the jury is contrary to the evidence as a matter of law.

We reverse the judgment of the trial court and here render judgment that the appellant is not guilty by reason of insanity. The trial court shall retain jurisdiction over the appellant for disposition under TEX. CODE CRIM. PROC. ANN. art. 46.03, § 4(d) (Vernon Supp. 1984).

Considering all of the evidence, we further believe that the finding by the jury of the vital fact of sanity is so contrary to the great weight and preponderance of the evidence as to be clearly wrong. Were we to reach the great weight and preponderance of the evidence point, we would likewise sustain it, which would result in a remand for a new trial.

PRESTON H. DIAL, JR.,
ASSOCIATE JUSTICE

JOYCE ANN VAN GUILDER,
Appellant

No. 889-84 v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Fourth Supreme Judicial District of Texas [BEXAR COUNTY]

OPINION ON STATE'S PETITION FOR DESCRETIONARY REVIEW

Appellant was convicted of one count of attempted murder and sentenced to twenty (20) years incarceration at the Texas Department of Corrections. The jury found the appellant not guilty by reason of insanity on three other counts of attempted murder and one count of murder. All five charges arose out of the same continuous transaction.

The Fourth Court of Appeals reversed the trial court's judgment, concluding that appellant's affirmative defense of insanity had been established as a matter of law and that the jury finding on insanity was against the "great weight and preponderance of the evidence." *Guilder v. State*, 674 S.W.2d 915 (Tex.App. - San Antonio 1984). We granted the State's Petition for Discretionary Review to examine that holding.

Five medical experts testified for the defense, all of whom agreed that appellant was legally insane on the date of the offense.

The State offered no evidence to rebut appellant's insanity defense.

The issue in this case concerns the proper standard of review to be used by the court of appeals in criminal cases in general and the standard of review in criminal cases involving an affirmative defense in particular.

In cases where the sufficiency of the evidence to support a criminal conviction is at issue the reviewing court is limited to an analysis based on the test established in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In *Jackson*, supra, the Supreme Court required that all the evidence be viewed in the light most favorable to the verdict with the appellate court limiting its inquiry to whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. This is accomplished in the reviewing court by considering all the evidence in the case, resolving all conflicts and all reasonable inferences in favor of the verdict and then determining whether there is sufficient evidence to support the judicial action demanded.

The Supreme Court reasoned,

> ...[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt.' *Woodby v. Ins.*, 385 U.S. at 282, 87 S.Ct., at 486 (emphasis added). Instead, the relevant question is

> whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana*, 406 U.S. at 362, 92 S.Ct. at 1624-1625. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the fact-finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson, supra, at 318-319.

In a well-reasoned opinion styled *Wilson v. State*, 654 S.W.2d 465 (Tex. Cr. App. 1983), this Court further quoted *Jackson*, supra, in determining that the *Jackson* standard of review was based on notions of due process enumerated in the Fourteenth Amendment and was thus binding on the states as a constitutional minimum of protection for criminal defendants:

> Under [In re] Winship [397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)] which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that

> when such a conviction [that was obtained even when no rational trier of fact would have found guilt beyond a reasonable doubt] occurs in a state trial, it cannot constitutionally stand.

Wilson, supra, at 471.

There appears to be substantial confusion in the Courts of Appeal over the proper standard of review in criminal cases. This is due to their reading of Art. 5, Sec. 6 of the Texas Constitution and a recent decision of this Court, *Combs v. State*, 643 S.W.2d 709 (Tex.Cr.App. 1982). See *Minor v. State*, 653 S.W.d 349 (Tex.App - San Antonio 1983); *Minor*, supra (concurring opinion, J. Cadena).

It is true that as amended, Art. 5, Sec. 6 of the Texas Constitution reads, "that the decisions of said Courts [Courts of Appeal] shall be conclusive on all questions of fact brought before them on appeal or error." However , Art. 1820, V.A.C.S. as amended by the 67th Legislature in 1981 provides, "the judgment of the Courts of Appeal in *civil* cases shall be conclusive in all cases on the facts of the case." (Emphasis added).

> We do not read *Combs*, supra, as requiring anything less than the constitutional standard enumerated in *Jackson*, supra.

In *Combs*, supra, this Court stated:

> It is well settled that *our* Court does not have jurisdiction to pass upon the weight and preponderance of the evidence or to 'unfind' a fact.

> More specifically, our determination of sufficiency of the evidence have never involved passing on the weight and preponderance of the evidence.

Combs, supra, at 716.

In a footnote to the above quoted paragraph the Court stated:

> We perceive no other standard may be utilized by the Court of Appeals in reviewing criminal convictions other than the sufficiency of the evidence to support the conviction.

Combs, supra, at 716.

Far from dictating that the court of appeals will be granted fact jurisdiction, this Court in *Combs*, supra, clearly states that the due process standard reviewing proof beyond a reasonable doubt, created in *Jackson*, supra, must be used by the court of appeals in reviewing criminal cases.

> To allow the court of appeals to evaluate the facts in a criminal case and to reverse based on their individual belief that a jury finding is against the great weight and preponderance of the evidence both misconceives the burden of proof required for criminal convictions and usurps the function of the jury. In effect, this would make the courts of appeal a thirteenth juror with veto power. Neither the Texas constitution nor *Combs*, supra, supports such a standard of review.

It appears that the confusion in the court of appeals' decision in this area stems from the insertion into the case of an affirmative defense.

With all affirmative defenses the burden of proof is shifted to the defendant who must prove his defense by a preponderance of the evidence. Tex.Penal Code, Sec. 2.04(d) provides this standard of proof:

> If the issue of the existence of an affirmative defense is submitted to the jury, the Court shall charge that the defendant must prove the affirmative defense by a preponderance of the evidence.

This burden is very different from that required of all other defenses that are not specifically defined as affirmative defenses in the Texas Penal Code. In other defenses the burden of producing evidence is shifted to the defendant. However, after he has met this burden of production, the State must disprove the allegation beyond a reasonable doubt. Tex.Penal Code Sec. 2.03(d). This level of proof is not required of the State in affirmative defense cases.

Problems with the burden shifting in affirmative defense cases are presented in reviewing the sufficiency of both the affirmative defense and all the evidence. In order to preserve the minimum due process protection established in *Jackson*, supra, and *Winship*, supra, the court of appeals must be allowed to review the sufficiency of the evidence to support the defendant's affirmative defense as well as the sufficiency of the evidence to support the conviction. Otherwise, a defendant's constitutional right to a review of the sufficiency of the evidence to support the conviction. Otherwise, a defendant's constitutional right to a review of the sufficiency of the evidence to support his conviction is violated. For example, in a case in which the affirmative defense of insanity is asserted and the State responds with some

form of rebuttal evidence, be it by cross-examination of defendant's witnesses or by direct examination of their own witnesses, in order for the court of appeals to fulfill the *Jackson* test it must make some kind of determination on sanity because the evidence has made sanity an issue in the case. Without this review on sanity, in every case involving this affirmative defense issue, the appellate court would be constrained to find that the evidence supported the verdict because they would have to *assume* that the affirmative defense was not adequately proven. In short, the appellate court would have to accept the implicit jury finding on the affirmative defense even if irrational.

Because some review of the affirmative defense is necessary in such cases in order to afford an appellant due process under *Jackson*, supra, this Court, in keeping with the principles of *Jackson*, supra, must provide a standard of review consistent with constitutional law in this area and the inviolability of the jury as fact finders in Texas criminal law. Therefore, we hold that in reviewing a case involving an affirmative defense, the court of appeals must review the evidence on the affirmative defense by looking at the evidence in the light most favorable to the implicit finding by the jury with respect to such affirmative defense and then determine, by examining all the evidence concerning the affirmative defense, if any rational trier of fact could have found that the defendant failed to prove his defense by a preponderance of the evidence. The court of appeals is limited in its review using this preponderance standard to evidence submitted on the issue of the affirmative defense in question. This review is called for when the defendant is contesting the sufficiency of the evidence to support his conviction because of his assertion that he adequately proved his affirmative defense. It is important to note that this analysis does not involve the ap-

pellate court in any fact finding function. The test evaluates the legal sufficiency of the evidence using a legal standard. There must be no reweighing or reclassifying of the evidence by the appellate court.

Using these standards, the type of evidence introduced on the affirmative defense will determine the conclusion to be drawn by the appellate court. For example, in *Madrid v. State*, 595 S.W.2d 106 (Tex.Cr.App. 1979), both the defendant and the State presented evidence of insanity. Tex.Penal Code Sec. 8.01(a) describes legal insanity:

> It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect did not know that his conduct was wrong.

The defendant's evidence in *Madrid*, supra, consisted of one doctor specializing in psychiatry. The doctor testified that he examined the defendant for and hour and a half and, without any psychological testing, determined defendant to have been insane at the time of the offense. In rebuttal, the State called an expert witness who testified that he could not make a diagnosis on insanity based on a ninety minute examination. Thus, he expressed no opinion on the insanity of the defendant.

The defendant in *Madrid*, supra, argued, as did appellant in the instant case, that his evidence of insanity was undisputed and thus conclusively shown. This Court held that the jury was not required to believe the defendant's expert witness and the Court would not reverse such a case based on the weight and credibility of the evidence.

While the opinion in *Madrid*, supra, is no doubt correct, it needs further explanation in order to put it in the perspective of the instant case. *Madrid*, supra, can best be seen as a case where there was competent evidence on both sides of the insanity issue. While the State's expert expressed no opinion on insanity, he did testify that he could not make such a determination based on a ninety minute interview. This can easily be seen as evidence rebutting the defendant's expert's finding of insanity. This is especially so because both doctors examined defendant for the same period of time, one making a determination on insanity, the other saying no determination was possible.

Because of the conflict in evidence on the issue of insanity the *Madrid*, supra, court was reluctant to reverse the trial court's findings. When there is evidence on both sides of the insanity issue it is much more difficult in reviewing a case to find that the jury acted irrationally.

On the other end of the spectrum is a case like the one presented here . In the instant case the State offered no evidence of any kind to rebut the defensive theory of insanity. Far from rebuttal, the prosecutor even admitted on the record, outside the presence of the jury, that a State employed pshchiatrist concurred with the defense experts that the appellant was legally insane at the time of the offense. Therefore, there is no conflicting evidence. In this situation, as stated before, the appellate court must be allowed to review the sufficiency of the implicit jury holding that appellate did not prove, by a preponderance of the evidence, that she was insane at the time of the offense. The appellate court is not reweighing the evidence or unfinding facts, but only determining if the jury finding was rational.

Although the court of appeals' recitation of the facts was more that adequate a brief review of them here is helpful.

The record shows that appellant burst through the doors of two separate apartments in succession yelling, "You're gonna pay, you killed her" and "You killed her, and you're gonna pay for it," whereupon she shot five people with a .22 caliber pistol, killing one. Appellant then threw the pistol away and fled from the apartment complex.

Appellant was apprehended close to the scene after she had apparently jumped or fallen off an embankment onto the apron of the interstate highway, breaking a leg and injuring her back.

The only evidence submitted by appellant at trial dealt with her affirmative defense of insanity. Based on the testimony of friends, relatives and medical personnel it was revealed that appellant's father was an alcoholic who occasionally abused her mother, that appellant was sexually molested at an early age, that appellant suffered an attempted incestuous relationship, that appellant had trouble with her sexual identity, (she dressed in a masculine fashion and referred to herself as "Kevin" on several occasions) and that appellant had a homosexual affair while serving in the military. Appellant was discharged from the military for being medically unfit, a conclusion drawn by an army psychiatrist who diagnosed her condition as being "schizophrenic, chronic, differentiated type."

Appellant told the paramedics who arrived to aid her after the shootings, "Ya'll need to go over there and help the children. Somebody's going to hurt them," after which she mentioned her

name, Joyce Ann Van Guilder. Appellant told the paramedics that Joyce was a "bad person" and that "she was going to hurt the children and we needed to stop her...."

At the hospital after the arrest, she gave a recorded statement to the police in which she said, "someone told me they were after me...someone told me I had to save the children. I had to go down there and get them. They were hurting the children. I had to stop it." In response to several questions about her identity she replied, "I don't know who I am...Because sometimes I know and sometimes I don't know."

At trial appellant testified she believed she was in a jogging race like the one in the movie "Chariots of Fire." Also, appellant believed she was being followed by a "big green car with a fat lip."

As we stated before, at trial five expert medical witnesses testified that appellant was insane at the time of the offense. Dr. William Gilliam, a psychiatrist and member of the medical board responsible for appellant's discharge from the army, found appellant medically unfit because of a condition he labeled as "schizophrenic, chronic, differentiated type." This condition resulted in her being 30% medically disabled. Dr. Paul Mohl, a psychiatrist on the staff at Medical Center Hospital where appellant was brought after her arrest, testified that appellant's thinking was not logical, that she had unrealistic ideas and that she believed herself to be the biblical character "Jacob." He concluded appellant was a psychotic of the schizophrenic type. Dr. James O. Sherman, a psychiatrist employed by Bexar County, administered psychiatric tests and diagnosed appellant as having a schizophrenic disorder of paranoid type. This resulted, Dr.

Sherman testified, in appellant not fully appreciating the wrongfulness of her acts or being able to conform her behavior to the standards of law. Dr. John Sparks, another psychiatrist employed by Bexar County, concluded appellant had a schizophrenia of a paranoid type and that, on the date of the offense, she did not know that what she was doing was wrong and was incapable of conforming her conduct to the laws of society. Dr. Franklin Reddmann, a private psychiatrist, when asked a hypothetical question based on the facts of the case, concluded that the person described would be unable to tell right from wrong and would be unable to conform her conduct to what was right as a result of her mental disorder. Finally, the prosecutor admitted that a psychistrist employed by the State, Dr. Clifford Barnhardt, concurred with the defense experts that, on the date of the offense, appellant was suffering from a paranoid schizophrenic condition which was the cause of her not being able to conform her conduct to the requirements of the law. The State produced no rebutting evidence by way of cross or direct examination.

Using the standards set up here in reviewing all the evidence presented concerning insanity we hold that no rational trier of fact could have found that appellant failed to prove her affirmative defense by a preponderance of the evidence.

Accordingly, the judgement of the Court of Appeals reversing the trial court is affirmed.

W.C. DAVIS, JUDGE

Delivered November 6, 1985

En Banc

Publish

Onion, P.J. and Clinton, J. Concur in Result
White, J. Not Participating

JOYCE ANN VAN GUILDER,
Appellant

No. 899-84 vs.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Fourth Supreme Judicial District [BEXAR COUNTY]

CONCURRING OPINION

The State erroneously suggests that regardless of the quality or quantity of credible evidence an accused person presents to the trier of fact to establish an affirmative defense, if the jury finds against him or her, then the reviewing court cannot disturb the jury's finding. This is simply not the law of this State and has never been the law of this State.

The law, however, contrary to the State's assertion, is clear: No matter how reluctant this or any other reviewing court might be to set aside the verdict of a jury, it will not hesitate to do so when the evidence is found to be insufficient as a matter of law, or when the evidence going to an affirmative defense is

established as a matter of law. In that instance, the reviewing court becomes the thirteenth juror with veto power over the trier of fact's verdict.

The record reflects that the appellant was charged with committing five felony offenses (1-murder; 4-attempted murders) that occurred during the same transaction or criminal episode. The jury returned verdicts of not guilty by reason of insanity on the murder charge and not guilty by reason of insanity on three of the attempted murders. Notwithstanding these verdicts, it found the appellant guilty of one of the four attempted murder offenses.

The appellant's defense was that when she committed the offenses she was legally insane. In suport of her defense, the appellant presented, in addition to lay testimony, five leading psychiatrists who testified that when appellant committed the offenses she was legally insane. The State did not offer or attempt to introduce any evidence to controvert or rebut the appellant's affirmative defense of insanity, nor did it make any effort through cross-examination to discredit the appellant's expert witnesses.

The majority opinion correctly sustains the holding of the San Antonio Court of Appeals, see *Van Guilder v. State*, 674 S.W.2d 915 (Tex.App.-San Antonio 1984), that appellant established her affirmative defense of insanity as a matter of law.

It is true, of course, that when an accused person presents any affirmative defense, he or she has the burden to establish that defense by a preponderance of the evidence. Once the accused person has satisfied that burden, and the State controverts

or rebuts such defense, it then becomes the responsibility of the trier of fact to make the determination whether the accused person established his defense by a preponderance of the evidence. If the evidence is uncontroverted, as it was here, there is nothing for the trier of fact to decide, and the trial judge should instruct the jury to return a verdict of not guilty because of the uncontradicted and uncontroverted affirmative defense.

Under our present law, the State has no burden to negate or disprove any affirmative defense, such as insanity. Nevertheless, and contrary to what occurred in this cause, it must not sit idle if the accused person presents an affirmative defense by credible evidence.

At least since 1919, when numerous and apparently credible witnesses testify that the accused person is legally insane, and such testimony is not controverted or rebutted by the State, this Court will not allow a conviction to stand. *Kiernan v. State*, 84 Tex.Cr.R. 535, 208 S.W. 518 (Tex.Cr.App. 1919). Also see *Gardner v. State*, 85 Tex.Cr.R. 103, 210 S.W. 694 (1919). Cf. *Smith v. State*, 15 Tex.Ct.App. 338 (1884) (defense of self-defense may be established as a matter of law.)

Whether an affirmative defense has been established as a matter of law rests on whether the affirmative defensive evidence or testimony was uncontradicted. In *Pittman v. State*, 144 S.W.2d 569 (Tex.Cr.App.1940), this Court, speaking through Judge Krueger, stated the following: "It is true the jury convicted the appellant, and their verdict is always respected and upheld by this Court when there is evidence upon which it might have been based; but when the verdict is against the uncontroverted testimony, it is our solemn duty to set it aside."

The court of appeals correctly stated that "Jurors may reject the opinion of experts if it does not comport with their ideas of sound logic...Jurors are not required to give conclusive effect to the opinion of experts, but they may not arbitrarily disregard such testimony." Thus, when a defendant claims on appeal that he had established an affirmative defense as a matter of law, the question, is not how much weight should be given the testimony of the witnesses, for...that was the responsibility of the trier of fact; the question instead, is whether the evidence that was presented established the affirmative defense as a matter of law.

In this instance, there is simply *no testimony*, either medical or lay, from which any rational trier of fact could conclude that the appellant was sane at the time of the offense. It is now axiomatic that a jury that totally disregards credible and uncontradicted evidence cannot be considered to have acted as a rational trier of fact. The due process clause of the Federal Constitution and the due process clause of the Texas Constitution forbid any conviction to stand when it is founded upon evidence insufficient to persuade a rational trier of fact of guilt beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The majority opinion authored by Judge W.C. Davis correctly sustains the holding of the San Antonio Court of Appeals, see *Van Guilder v. State*, supra, that there is *no evidence* to support the jury's finding that appellant was legally sane at the time of she committed the offenses of attempted murder and murder. In sum, "[N]o rational trier of fact could have found [from the evidence that was presented] that appellant failed to prove her affirmative defense [of insanity] by a preponderance of the evidence."

In this instance, because of the quality and quantity of the appellant's evidence, adduced through at least five leading pyschiatrists with unimpeachable credibility, and because the State presented absolutely *no evidence* of any kind to rebut or controvert the appellant's affirmative defense of insanity, and no effort was made by the prosecution to lessen the impact of the doctors' testimony through cross-examination, the cases should not have even been submitted to the jury; the trial judge should have instructed the jury to return verdicts of not guilty by reason of insanity on all of the cases.

I concur to the majority opinion affirming the judgment of the court of appeals.

TEAGUE, Judge

EN BANC

DELIVERED: November 6, 1985

PUBLISH

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0899-84
STYLE: Guilder, Joyce Ann Van

January 29, 1986

On this day State's Motion for Rehearing was denied. Judge White not participating.

Thomas Lowe, Clerk

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0899-84
STYLE: Guilder, Joyce Ann Van

February 11, 1986

On this day the State's Motion to Stay Mandate has been granted for 60 days.

Thomas Lowe, Clerk